FREE COPY

No. 721

Office - Supreme Court, U. S.
FILED
MAR 30 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1949

No. .....

JEPSON L. NELSON, *Petitioner,*

v.

LOUIS JOHNSON, Secretary of National Defense, et al.,
Respondents.

No. .....

CHARLES W. REEVES, *Petitioner,*

v.

LOUIS JOHNSON, Secretary of National Defense, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLAUDE L. DAWSON,
917 - 15th St., N. W.,
Washington, D. C.
Attorney for the Petitioners.

WILSON - EPES PRINTING CO. RE 6003 - WASHINGTON 1, D. C.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of Facts	3
Specifications of Errors to Be Urged	5
Reasons for Granting the Writ	5
Pertinent Statutes and Executive Orders	7
Argument and Brief	14
The Petitioners Were Not Required to Exhaust Their Administrative Remedies	20
The Rule That Administrative Remedies Must Be Exhausted Does Not Apply Where There Is No Such Right of Appeal	26
The Cases Cited by the United States Court of Appeals for the District of Columbia Are Not in Point	27
Conclusion	28

TABLE OF CASES CITED

Colorado v. Toll, 268 U. S. 228, 69 L. Ed. 927 22
Dunlap v. Black, 128 U. S. 40, 48, 32 L. Ed. 354 22
Farley v. United States, 92 Fed. (2d) 533 ..... 21, 22
Federal Power Commission v. Arkansas Power & Light Co., 330 U. S. 802, 91 L. Ed. 1261, 67 S. Ct. 963 28
Ferris v. Wilbur, 27 Fed. (2d) 262, 264 (4th C. C. A.).. 23
Hammond v. Hull, 131 Fed. (2d) 23 (App. D. C.)..... 23
Hilton v. Sullivan, 334 U. S. 323 ..... 6, 14, 23
Macauley v. Waterman S. S. Corp., 327 U. S. 540, 90 L. Ed. 839, 66 S. Ct. 712 28
Miguel v. McCarl, 291 U. S. 442, 78 L. Ed. 901 22
Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459 27

PAGE

Noce v. Hill, 76 Fed. (2d) 198 (9th C. C. A.) 23
Order of Railway Conductors v. Pitney, 328 U. S. 561, 566 ..... 6, 28
Roberts v. United States, 176 U. S. 221, 229, 231, 44 L. Ed. 443 22
Securities & Exchange Commission v. Otis & Co., 338 U. S. 843, rehearing denied, 338 U. S. 888 ..... 7, 27
Steele v. Louisville & Nashville RR. Co., 323 U. S. 192, 89 L. Ed. 173 27
Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 74 L. Ed. 1034, 50 S. Ct. 427 28
United States Alkali Export Assn., Inc. v. United States, 325 U. S. 196, 89 L. Ed. 1554 27
United States v. Wilbur, 283 U. S. 414, 75 L. Ed. 1148.. 23
Virginian R. Co. v. System Federation R. E. D., 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592 28
Waite v. Macy, 246 U. S. 606, 62 L. Ed. 893 22
Wettre, et al v. Hague, et al, 168 Fed. (2d) 825 23
Wilbur v. United States, 281 U. S. 206, 218, 222, 74 L. Ed. 809 22
Work, Secretary of Interior v. Louisiana, 269 U. S. 250, 70 L. Ed. 259 21

AUTHORITIES CITED

Act of March 3, 1865, 13 Stat. 571 15
Act of August 15, 1876, 19 Stat. 5 USC 37 15
Act of August 23, 1912, 37 Stat. 413, 5 USC 648.... 7, 20, 24
Act of June 27, 1944, 58 Stat. 387, 5 USC 851.... 9, 11, 17, 23
Executive Order #4240 ..... 11, 20

Supreme Court of the United States

October Term, 1949

No. .....

JEPSON L. NELSON, *Petitioner,*

v.

LOUIS JOHNSON, Secretary of National Defense, et al., *Respondents.*

No. .....

CHARLES W. REEVES, *Petitioner,*

v.

LOUIS JOHNSON, Secretary of National Defense, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, and the appellees below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on January 16th, 1950 (R. 71).

OPINIONS BELOW

The District Judge of the United States District Court for the District of Columbia did not render an opinion in these causes. The opinion of the United States Court of Appeals for the District of Columbia is set forth on pages 68 and 69 of the record.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on January 16th, 1950 (R. 71). Jurisdiction of this court is invoked under Section 2101, Title 28 of the Judicial Code of the United States.

THE QUESTION PRESENTED

These cases involve the question of whether the petitioners whose rights under the Veterans Preference Acts and Executive Orders of the President of the United States were being wilfully and knowingly violated by the respondents were required to exhaust an administrative remedy before resorting to the Courts to enforce their rights. The petitioners assert that any such appeal would have been futile for the reason that administrative board to whom appeal might have been taken would still be bound by the terms of the statutes and Executive Orders of the President. This Court is to determine whether the decision of the United States Court of Appeals for the First Circuit holding that in a like situation it was not necessary to exhaust administrative remedies, or whether the decision of the United States Court of Appeals for the District of Columbia is correct in holding that in spite of the fact that the respondents are wilfully and knowingly violating the statutes and Executive Orders of the President of the United States that petitioners must still exhaust administrative remedies, if any exist.

The petitioners further contend that no right of appeal exists under the 1912 statute (5 U. S. C. 648) nor under the Executive Orders (#4240) which were violated by the respondents.

STATEMENT OF FACTS

The cases of *Nelson* v. *James V. Forrestal,* Secretary of National Defense, and *John L. Sullivan,* as Secretary of the Navy, Civil Action No. 1454-48, and *Charles W. Reeves* v. *James V. Forrestal,* Secretary of National Defense, and *John L. Sulllivan,* as Secretary of the Navy, Civil Action No. 1455-48, were consolidated by the District Court for hearing for the reason that each case involved a similar question of fact and law. Pending the adjudication of these cases, Louis Johnson, Secretary of National Defense, and Francis P. Matthews, Secretary of the Navy, were substituted in lieu of James V. Forrestal, Secretary of National Defense and John L. Sullivan, Secretary of the Navy. Each of the petitioners is a veteran preference eligible. The undisputed facts in this case show in the Nelson case that he entered the employment of the United States at the Philadelphia Naval Shipyard on January 2nd, 1941 (R. 38) and was continuously employed therein until he was promoted to the grade of Leadingman Electrician on October 16th, 1944; that he was demoted on November 4th, 1946 from a Leadingman Electrician to an Electrician, but was restored to this position on April 11th, 1947. On March 15th, 1947 (sic—1948) (R. 39) a notice in writing was served upon the petitioner, Nelson, that effective May 17th, 1948 he would be demoted in grade from a Leadingman Electrician to an Electrician, Maximum Pay Rate. On March 15th, 1948 (R. 40) the plaintiff's efficiency rating was good or better, but notwithstanding this fact, the respondents kept in the position and grade of Leadingman Electrician the following persons to wit: William C. Sloan, Jr., Peter J. Von Gerichten, Howard H. Koch, James McAuley, James J. Durante, Austin McDermott,

Joseph L. King, John J. Exler, Edward H. Singley, John H. Conrad, John K. Kaiser, Charles H. Fleck, David Fontana, Somers New, Leon E. Asay, Edwin M. Messick, Louis R. Difilippo and John J. Ridgway, Jr., all of these persons were not honorably discharged soldiers, sailors or marines and had no preference rights over and above the petitioner, Nelson. The reduction in rank, grade and salary of the petitioner, Nelson, arose from a reduction in the force in the Philadelphia Naval Shipyard (R. 40). The suit was brought to obtain a preliminary injunction restraining the respondents and each of them from reducing the petitioner in rank, grade and salary contrary to the provisions of the statutes and Executive Orders of the President of the United States under which the petitioner, Nelson, had a preferential right to the position and grade of Leadingman Electrician so long as his efficiency rating was good or better and so long as the position existed in the Philadelphia Naval Shipyard and was not filled by other honorably discharged soldiers, sailors or marines. The petitioner, Nelson's, motion for a preliminary injunction was denied by District Judge Goldsborough (R. 57-58), who, at the same time, ordered that the cause be advanced for trial (R. 57). Thereafter each side filed a motion for a summary judgment (R. 45-56). On October 18th, 1948, the District Court granted the motion of the petitioner, Nelson, for a summary judgment (R. 58-59). An appeal was taken on December 16th, 1948 (R. 59).

The facts in the case of petitioner, Reeves, are practically identical with the facts in the Nelson case. (R. 59-60-61). In the Reeves case, the petitioner was reduced from a Leadingman Pipefitter to a Pipefitter as of May 17th, 1948 and the respondents kept and maintained in the position of Leadingman Pipefitter the following persons to wit: James J. Murnane, James R. Breenan, Henry Bayard and Julius McCarthy, all of whom were not honorably discharged soldiers, sailors or marines and who had no preference in the position of Leadingman Pipefitter

over and above the rights of the petitioner, Reeves. The cases were consolidated by the District Court and were heard together and all orders entered in the Nelson case were likewise entered in the Reeves case and the District Court sustained a motion for summary judgment likewise in the Reeves case in favor of the petitioner (R. 58-59). The sole question involved in the matter of the petition of certiorari in these causes is whether the petitioners rights are so fixed and determined by statutes that it was unnecessary to exhaust their appeals through the United States Civil Service Commission. The U. S. Court of Appeals for the First Circuit, in the case of *Wettre* v. *Hague* (168 F. 2nd 825), where the facts are similar to the Nelson and Reeves cases, held that it was not necessary to exhaust any administrative remedies. The United States Court of Appeals for the District of Columbia does not agree with the decision of the United States Court of Appeals for the 1st Circuit, and there is clearly a conflict between the two Circuits.

SPECIFICATIONS OF ERRORS TO BE URGED

That the United States Court of Appeals for the District of Columbia erred in reversing the judgment of the United States District Court for the District of Columbia entered in favor of the petitioners upon the ground that the petitioners had failed to exhaust their administrative remedies.

REASONS FOR GRANTING THE WRIT

The petitioners assert that a Writ of Certiorari should be granted under subdivision (5b) of Rule 38 of this court in that the United States Court of Appeals for the District of Columbia has rendered a decision in conflict with the decision of the United States Court of Appeals for the First Circuit on the same question of law.

The decision of the United States Court of Appeals for the District of Columbia clearly conflicts with the decision of the United States Court of Appeals for the 1st Circuit in *Wettre, et al* v. *Hague, et al,* decided on June 29th, 1948, and reported in 168 F. 2d at page 825. The facts in the case of *Wettre* v. *Hague* are identical with the facts in the instant case. In the Wettre case, supra, the plaintiffs were Veterans Preference Eligibles employed in the Boston Naval Shipyard. They were civil service employees with efficiency ratings of good or better, and the defendants, Hague et al., who were the officials in charge of the Boston Naval Shipyard, were about to demote them from supervisory positions in the Boston Naval Shipyard and at the same time retain civilian employees who were not Veterans Preference Eligibles. The First Circuit held that the action of the shipyard officials was clearly a violation of the plaintiffs' legal rights under the applicable statutes granting preference to the plaintiffs as Veterans Preference Eligibles, and that there was no longer any occasion for the requirement that they exhaust any administrative remedies they may have before seeking to vindicate their rights in court, because the statute was so obviously violated that a court of equity could, in a proper case, intervene. In the opinion in these cases, it is stated by the court below as follows (R. 70):

> "It appears from appellees' complaints that they have not exhausted their statutory rights of appeal to the Civil Service Commission. Apparently their appeals to the Commission were pending when they brought these suits and the Commission withheld decision in view of the suits.
>
> We think the District Court erred in granting summary judgment to appellees. In Wettre v. Hague, 168 F. 2d 825, the Court of Appeals for the First Circuit based a different conclusion on Order of Railway Conductors v. Pitney, 326 U. S. 561, 566, and Hilton v. Sullivan, 334 U. S. 323. But the Hilton case involved dismissal and this case involves demotion. The fact that administrative action is probably erroneous

does not create an exception to the rule that administrative processes must be exhausted before judicial relief is sought. Securities & Exchange Commission v. Otis & Co., 338 U. S. 843, rehearing denied, 338 U. S. 888.

It is apparent from the foregoing that the United States Court of Appeals for the District of Columbia rendered a decision in these cases contrary to the United States Court of Appeals for the 1st Circuit in Wettre v. Hague based upon almost identical facts, and it would appear that these cases fall clearly within Rule 38 (5b) and that the Court of Appeals for the District of Columbia, by a Per Curiam opinion, intended to certify the question to this court for the determination of which Circuit was right on the question of law involved.

PERTINENT STATUTES AND EXECUTIVE ORDERS

"In the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary.

"Any person knowingly violating the provisions of this section shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than $1,000 or by imprisonment for not more than one year. [Aug. 23, 1912, c. 350, Sec. 4, 37 Stat. 413; Feb. 28, 1916, c. 37, Sec. 1, 39 Stat. 15, 5 U. S. C. 648.]

"Sec. 652. REMOVALS FROM CLASSIFIED CIVIL SERVICE ONLY FOR CAUSE. No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him,

and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but not examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation."

5 U. S. C. 652.

"Sec. 851. PERSONS ENTITLED TO FEDERAL EMPLOYMENT PREFERENCES. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive Order; and (d) the civil service of the District of Columbia, preferences shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the Department of the Army or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the

United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions. [June 27, 1944, ch. 287, Sec. 2, 58 Stat. 387, amended July 26, 1947, c. 343, Title II, Sec. 205 (a), 61 Stat. 501, 5 U. S. C. 851]

"Sec. 861. REDUCTIONS IN PERSONNEL; CONSIDERATIONS AFFECTING RELEASE. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings; Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service; Provided further, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. [June 27, 1944, ch. 287, Sec. 12, 58 Stat. 390, 5 U. S. C. 861.]

"Sec. 863. DISCHARGE, SUSPENSION, ETC., ONLY FOR CAUSE; REASON IN WRITING; AD-

VANCE NOTICE; PERSONAL APPEARANCE; FINDINGS AND RECOMMENDATIONS. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision; Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission may declare any such preference eligible who may

have been dismissed or furloughted without pay to be eligible for the provisions of section 864, of this title. [June 27, 1944, ch. 287, Sec. 14, 58 Stat. 390, amended Aug. 4, 1947, c. 447, 61 Stat. 723, 5 U. S. C. 863]

"Sec. 867. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this chapter shall be not construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof. (June 27, 1944, c. 287, Sec. 18, 58 Stat. 391)."

EXECUTIVE ORDER 4240

Executive Order #3567

"In lieu of that part of Section 7 of Executive Order of October 24, 1921, which provides:

> In cases of reductions in the number of employees on account of insufficient funds or otherwise, *necessary demotions and dismissals shall be made* in order, beginning with the employees having the lowest ratings in each class, but *honorably dicharged soldiers and sailors whose ratings are good shall be given preference in selecting employees for retention.*

The following rules are hereby prescribed to govern the selection of employees for demotion or separation from the departmental service on account of reduction in force.

EXECUTIVE ORDER #4240

Employees Eligible for Military Preference

1. Executive Order of March 3, 1923, will be construed to require that in selecting employees to be demoted or separated on account of any reduction of working forces honorably discharged soldiers, sailors, and marines, and the widows of such, and the wives of injured soldiers, sail-

ors, and marines, who themselves are not qualified for positions in the Government service, will be placed at the top of the lists of competing employees, in the order of their ratings, provided they attained for the last rating period an efficiency rating of not less than 80; and they will be retained in existing status, if their record in respect to deportment, attitude and attendance is satisfactory, in preference to all other persons with whom they are respectively in competition.

Employees Not Entitled to Military Preference

2. When preparing lists from which to select employees for demotion or separation on account of reduction of force, credits for length of service will be added to all efficiency ratings of 65 or higher as follows:

.1	for	the	first	full	year	of	government	service
.2	"	"	second	"	"	"	"	"
.3	"	"	third	"	"	"	"	"
.4	"	"	fourth	"	"	"	"	"
.5	"	"	fifth	"	"	"	"	"
.6	"	"	sixth	"	"	"	"	"
.7	"	"	seventh	"	"	"	"	"
.8	"	"	eighth	"	"	"	"	"
.9	"	"	ninth	"	"	"	"	"

and one point for each year thereafter, except that the maximum credit for length of service shall not exceed twenty-five points. The period of service shall be computed from the date of original employment, whether as a classified or unclassified employee in the civil service of the United States, and shall include periods of service at different times and services in one or more departments, branches, or independent offices of the Government, and shall also include service performed under authority of the United States beyond seas, and honorable service in the Army, Navy, Marine Corps, or Coast Guard of the United States: *Provided:* That all periods of separation from the service and so much of any period of leave of absence as may exceed six months shall be ex-

cluded. Credit will not be given for service rendered beyond retirement age. For example, an employee with ten years of service, whose efficiency rating was 70, would receive a demotion or separation rating of 75.5 while one with thirty years or more of service and a rating of 70 would receive a demotion or separation rating of 95. Demotions and separations from each class heretofore or hereafter established by the Personnel Classification Board will be made in order beginning with the employee having the lowest rating, except that an employee with a higher rating may be demoted or separated in preference to another with a lower rating if the duties of the position to be retained cannot be acceptably performed by the employee with the higher rating after a reasonable preliminary training period. Honorably discharged soldiers, sailors, and marines, who are not qualified for positions in the Government service, whose efficiency ratings are below 80 and therefore are not entitled to military preference, will, after having received service credits to which they are entitled, compete with other employees not entitled to military preference.

3. In making selections for demotion or separation on account of reductions of force the heads of departments and establishments shall consider dependency, official conduct, or other like factors, and may on the basis of these factors allow an additional credit not exceeding three points.

4. All proposed demotions and separations on account of reductions of force shall be reported to the Personnel Classification Board for its approval and action suspended pending advice from the Board.

5. The Personnel Classification Board shall from time to time promulgate such regulations as may be necessary to carry this order into effect.

CALVIN COOLIDGE

THE WHITE HOUSE
June 4, 1925.

ARGUMENT AND BRIEF

The petitioners Jepson L. Nelson and Charles W. Reeves are permanent civil service employees of the United States and also are honorably discharged soldiers of the United States entitled to veterans preference in their employment in the Philadelphia Naval Shipyard. As a result of a reduction in the force in the Philadelphia Naval Shipyard, the petitioners were reduced in rank, grade and salary, the petitioner Nelson from a Leadingman Electrician to an Electrician, Maximum Pay Rate, and the petitioner Reeves from a Leadingman Pipefitter to a Pipefitter, Maximum Pay Rate. At the same time, the officials of the Philadelphia Naval Shipyard kept and maintained in the position of Leadingman Electrician (R. 39) some seventeen (17) employees who had no veterans preference. At the time that the petitioner Reeves was reduced in rank, grade and salary, there were retained in the Philadelphia Naval Shipyard (R. 62) four (4) employees who had no veterans preference. The motion for Summary Judgment filed by the respondents (R. 45-46) admits the above facts pleaded in the complaints filed in these cases.

The action of the respondents in reducing each of the petitioners in rank, grade and salary was a wilful and deliberate violation of the law. The Act of August 23, 1912 provides as follows:

> • • • "In the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary." • • •

The provisions of this statute were extended by Executive Order 3801 of March 3, 1923, *Hilton* v. *Sullivan*, 334 U. S. 323, 92 L. Ed. 1416 at page 1425. Not only did the Act of August 23, 1912, supra, protect the petitioners in their official positions in the Philadelphia Naval Shipyard inasmuch as their efficiency ratings were good or bet-

ter. Sec. 12 of the Act of June 27, 1944 gave them a preference in their positions over competing employees who had no preference, and such competing employees are the non-veterans named in the complaint in each case. To make clear the rights which the petitioners have as honorably discharged soldiers of the United States in their respective positions in the Philadelphia Naval Shipyard, it is deemed appropriate to go into the history of veterans preference. It has been the settled policy of the United States for a period of some seventy-three years to extend benefits, with respect to employment and retention in government service, to those in the armed forces. This was first granted by the Act of March 3, 1865 (13 Stat. 571). On August 15, 1876, Chapter 287, Par. 3, 19 Stat. 143, 169, 5 U. S. C. 37, it was provided as follows:

> "* * * In making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors." * * *

The legislative policy was broadened and affirmed by the Act of August 23, 1912, supra. The statute clearly constitutes an unconditional Congressional mandate to the executive branch to accord veterans absolute retention preference over non-veterans, without regard to relative length of service and subject only to the requirement of a good efficiency rating.

Subsequent executive orders and regulations implemented and expanded the legislative policy established by the foregoing statutes. Pursuant to Section 4 of the Act of August 23, 1912, supra, the President, by Executive Order 3567 of October 24, 1921, directed that, in the event of demotions and dismissals of personnel in the classified departmental service, "honorably discharged soldiers and sailors whose ratings are good shall be given preference

in selecting employees for retention." On March 3, 1923, retention preference was extended to veterans in the field service by Executive Order 3801,[1] and in 1936, by order of the President, to government positions not under civil service.[2] While length of service was given limited recognition for retention purposes for the first time by Executive Order 4240 of June 4, 1925, that order reaffirmed the policy of granting absolute retention preference to veterans with "good" or better efficiency ratings. Only as against veterans with efficiency ratings lower than "good" were non-veterans given retention rights by reason of greater length of service. This limited recognition of length of service was further narrowed by Executive Order 5068 of March 2, 1929, which provided that, where the efficiency ratings of both veterans and non-veteran were equal, but both were less than good, the veteran had an absolute retention preference irrespective of length of service.

Finally, it is of great significance that the reduction-in-force regulations which the Civil Service Commission promulgated on July 31, 1943, and which remained in effect for almost a year immediately prior to enactment of the Veterans' Preference Act of 1944, gave effect to military preference and length of service in the same manner as the present regulations. (1-2) Specifically, the 1943 regulations gave retention preference, as between permanent employees in each grade, to (a) veterans with efficiency ratings of "Good" or better over non-veterans with ratings of "Good" or better, and (b) veterans with "Fair"

---

[1] Executive Order 3801 amended Civil Service Rule XII by the addition of Paragraph 5. It read in part, as follows:
"5. In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good."

[2] Departmental Circular 146, U. S. Civil Service Commission, October 22, 1936.

efficiency ratings over non-veterans with "Fair" efficiency ratings. As in the present regulations, length of service and high efficiency ratings were reflected in retention credits which determined the order of release within each category. It is this treatment of military preference and length of service which Commissioner Flemming referred to when he told the Senate Committee on Civil Service, apropos of the first clause of Section 12, that "our existing reduction-in-force regulations are in harmony with that." In brief, Congress was informed that under Section 12 the Commission would continue to give effect to the factors of military preference and length of service in the same manner as it had done in the existing regulations adopted in 1943. Here too, is the true explanation of the Commission's objection to Section 12 as originally drafted to require release of employees in the inverse order of total Federal service (including military service), on the ground that consideration should be given to the relative efficiency of employees. In the light of the 1943 regulations, it is perfectly clear that the Commission was only concerned that the original draft would preclude it from giving preference to non-veterans with "Good" efficiency ratings over veterans with lower ratings and from giving any retention credits for efficiency.

From the foregoing it is clear that, from 1876 until the enactment of the Veterans' Preference Act of 1944, the Government had followed a continuous policy of granting to veterans with "good" or higher efficiency ratings absolute preference in rentention in employment over non-veterans without regard to length of service. The Report of the House Committee on Civil Service, H. Rep. 1289, pp. 2-3, (78th Cong., 2d session) contains the following general statement regarding the purpose of the bill: (Act of June 27, 1944)

> It has been the policy of the United States Government since the beginning of the Republic to extend certain benefits to those who have risked their lives

in the armed services during wartime. Since shortly after the Civil War, the Congress has provided in various statutes for different forms of preference in governmental employment to war veetrans. These statutes have usually been in broad, general terms, and have been applied under Executive orders and regulations promulgated by the President.

For a number of years proposals have been introduced in Congress to codify or establish by statute veterans' preference in governmental employment. Your committee has conducted public hearings on this subject at least three times within the past few years. This bill is an attempt to meet the requirements of such an act. Careful consideration has been given to its provisions in the light of past legislation and practices. * * *

* * * The committee is of the opinion there should be put in one statute all provisions granting military preference in connection with civilian employment by the Government, in order that there may be statutory authority for the preference to be granted veterans in connection with appointment and retention in civilian positions.

The debates in Congress (90 Cong. Rec. 3502, 3503, 3505) and the public hearings before the Senate Committee on Civil Service (Hearings before the Committee on Civil Service, United States Senate, 78th Cong., 2d sess., on S. 1762 and H. R. 4115, pp. 8, 27) give further evidence that it was the intention of Congress to continue in effect the substance of the statutes, and to give legislative status to the several executive orders and regulations which accorded veterans' preference in government employment. They clearly indicate that it was not the intention of Congress to deprive veterans of any of their then existing preferences, including the preference in retention without regard to length of service for which the 1912 act had provided. But we need not rely upon such negative evidence, for nothing could be more explicit than Civil Service Commissioner Flemming's explanation of Section 12 to the Senate Committee (Senate Hearings supra p. 27); after quoting the second proviso, he stated:

> That proviso is substantially the same as a law passed by Congress in 1912, which was interpreted to apply to only the departmental service. By Executive order of March 3, 1923, the provisions of the law of 1912 were likewise extended to the Federal service, so that the last proviso simply continues what has been in practice throughout the entire Federal service since 1923.

In the light of these sweeping assurances that the proposed Act was intended to codify existing veterans' preferences and to subtract nothing therefrom, it is submitted that there exists a clearly established legislative intent to continue to accord to veterans with efficiency ratings of "good" or better preference in retention over nonveterans irrespective of the latters' length of service.

The second proviso to Section 12 of the Act is an explicit command that in the event of a reduction in force there must be given to veterans with an efficiency rating of good or better an absolute retention preference over competing non-veterans, irrespective of length of service.

It is in the setting afforded by the long continued policy of the Government to grant an absolute preference in retention to a veteran with an efficiency rating of "good" or better, over a competing nonveteran, and the proclaimed policy of Congress in enacting the Veterans' Preference Act to codify and expand but not to subtract from veterans' preferences, that the second proviso to Section 12 must be applied. It reads:

> "Provided further, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: * * *."

THE PETITIONERS WERE NOT REQUIRED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

This suit was brought to require the ~~petitioners~~ respondents to perform a duty imposed upon them by the law, regulations and Executive Orders. Where public officials, such as these respondents, are charged by law with the performance of certain duties and they have violated such laws or have failed to perform their public duties, equity will restrain such officials or compel them by mandatory injunction to perform their purely administrative duties.

The petitioners were reduced in their rank, grade and salary as employees of the United States Government in the Philadelphia Naval Shipyard. At the same time, the respondents kept and maintained, in the positions from which the petitioners were demoted, employees who had no veterans preference. The petitioners' efficiency ratings were "good" or better at the time of their reduction in grade. Their reductions in rank was in utter defiance of the Act of 1912 which provides in part as follows:

> "In the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary.
>
> Any person knowingly violating the provisions of this section shall be summarily removed from office, and may also upon conviction thereof be punished by a fine or not more than $1,000 or by imprisonment for not more than one year. (Aug. 23, 1912, c. 350, Sec. 4, 37 Stat. 413; Feb. 28, 1916, c. 37, Sec. 1, 39 Stat. 15.)"

The provisions of this statute was covered by Executive Order #4240 (p. 9-10) extending the provisions of the statute to the field service. Furthermore, the reduction of the petitioners was in utter defiance of Section 12 of the Veterans Preference Act of June 27, 1944 (p. 9).

Since the respondents were acting in utter defiance of the statute and Executive Orders, the petitioners, even though they did have an administrative remedy of appeal, were not required to exhaust it.

In such a situation, the petitioners do not have to exhaust their admministrative remedies even if such remedies exist. This question was fully decided by the Supreme Court of the United States in the case of *Work, Sec. of the Interior, v. Louisiana,* 269 U. S. 250, 70 L. Ed. 259. In that case a bill in equity was filed to restrain the Secretary of the Interior from rejecting a claim to swamp land filed by the State of Louisiana. A motion was made to dismiss the bill because the plaintiff had not exhausted the administrative remedy and that therefore the action was premature. It was asserted and admitted that the plaintiffs still have a right of appeal to the Secretary of the Interior. The Supreme Court said that the Secretary of the Interior was ignoring certain statutes in the adjudication of the claim and that the Court would grant relief even though the right of appeal existed.

The case of *Work, Secretary of the Interior, v. Louisiana,* supra, is directly in point. In that case, the question involved the construction of a law binding upon the officials, and in this case the same situation exists. The respondents are bound by the provisions of the statute, and that provisions of the statute and Executive Orders are binding not only on the respondents but on this Court.

In the case of *Farley v. United States,* 92 Fed. 2d 533, the question arose whether an employee of the postoffice Department was entitled to an automatic raise in salary under the terms of a statute. In concluding that the statute was binding and mandatory upon the Postmaster General the Court of Appeals for the District of Columbia said:

> "If the Acts to which we have referred means what we think they mean, and what we think they mean so

clearly as to leave no room for dispute, then petitioner advances by virtue of an act of Congress wholly without regard to any discretion on the part of the Department for it is given no power to suspend the operation of the automatic promotion statute. The question, therefore, is not, as counsel for the Government insist, that the effect of the mandamus is to invest petitioner with an office in defiance of respondent's right of control the internal affairs of his Department. It is not the writ which commands petitioner's promotion to grade 5, but the Act of Congress, which neither the Postmaster General or this Court is at liberty to ignore." (Italics supplied.)

It is the statutes and Executive Orders hereinbefore referred to that fixed the status of these petitioners, and their rights could not be destroyed by public officials any more than the Postmaster General could refuse to obey the provisions of a statute requiring an employee to be given an automatic raise in salary.

The rule that administrative remedies must be exhausted before relief may be granted has been and is always subject to the rule that public officials may be enjoined at any stage where rights existing under laws of the United States are being violated by the public officials. This rule is based upon the theory that, no matter what final action may be taken by the final appellate board to which an appeal may be taken, ultimately such appellate board is bound and governed by the provisions of the statutes under which such rights exist.

There is a long line of decisions to support this exception to the general rule:

Colorado v. *Toll*, 268 U. S. 228, 69 L. Ed. 927.
Roberts v. *United States*, 176 U. S. 221, 229, 231, 44 L. Ed. 443.
Waite v. *Macy*, 246 U. S. 606, 62 L. Ed. 893.
Miguel v. *McCarl*, 291 U. S. 442, 78 L. Ed. 901.
Farley v. *United States*, *supra*.
Dunlap v. *Black*, 128 U. S. 40, 48, 32 L. Ed. 354.
Wilbur v. *United States*, 281 U. S. 206, 218, 222, 74 L. Ed. 809.

United States v. *Wilbur,* 283 U. S. 414, 75 L. Ed. 1148.
Hammond v. *Hull,* 131 F. (2d) 23 (App. D. C.)
Noce v. *Hill,* 76 F. (2d) 198 (9th C. C. A.).
Ferris v. *Wilbur,* 27 F. (2d) 262, 264 (4th C. C. A.).

In the case of *Wettre* v. *Hague, et al,* 168 F. (2d) 825 with which decision the United States Court of Appeals for the District of Columbia does not agree, the Court of Appeals for the First Circuit held that the rights of the Appellants who occupied similar positions to the petitioners herein could not be defeated by failure to follow the administrative remedy of appeal. That case is directly in point with the decisions of this court in *Work, Sec. of the Interior,* v. *Louisiana* and other applicable decisions of this court, the theory being that even assuming that the petitioners had pursued their administrative remedies by appealing to the United States Civil Service Commission, that commission would still be bound by the provisions of the statutes and Executive Orders and the only result would be that the petitioners, who are entitled to immediate relief by the court, would be delayed from six months to a year in obtaining a decision which must, in the ultimate result, conform to the statutes and Executive Orders granting preference to the petitioners.

Nothing would be gained by the exercise of the right of appeal, because finally the petitioners would be entitled to a judgment restoring them to the positions from which they had been reduced in rank, grade and salary. The rights which the petitioners had were fully determined by the decision of this honorable court in the case of *Hilton* v. *Sullivan,* 334 U. S. 3323, 92 L. Ed. 1416.

The respondents will probably contend that the 1912 statute, supra, providing that no honorably discharged soldier or sailor shall, in the event of reduction in force, be discharged or reduced in rank, grade or salary, was repealed by Section 18 of the Act of June 27, 1944. Section 18 of the Act of June 27, 1944 provides as follows:

"Sec. 867. Repeal of inconsistent laws; saving clause. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this chapter shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive Order, civil-service rule or regulation, of any department of the Government or officer thereof. (June 27, 1944, c. 287, Sec. 18, 58 Stat. 391, 5 U S C 867.)"

This statute contains no repealing clause and preserves all rights existing at the time of the passage of the Act on June 27, 1944. The United States Court of Appeals for the 1st Circuit in the case of *Wettre* v. *Hague, supra,* held that the 1912 Act (5 U S C 648) was not repealed. Likewise, Executive Order 4240, supra, extending the statute to the field service was not repealed. In the case of *Hilton* v. *Sullivan,* supra, this court said:

"There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good'. Length of service in no way qualified the preference given the veteran. And subsequent executive orders not only recognized this provision as giving veterans an absolute preference, but also extended the preference to veterans in the field service and to positions not under civil service.

Executive Order 4240 of June 4, 1923, as amended by Executive Order 5068 of March 2, 1929, provided, as does Subgroup A-1 here, an absolute retention preference for veterans over nonveterans where the veterans' efficiency ratings were 'good', and a similar absolute preference over nonveterans whose ratings were less than good if the veterans' ratings were equal to those of the nonveterans. And at the time of passage of the Veterans Preference Act of 1944, there were 1943 Civil Service Regulations outstanding which granted veterans with permanent tenure and with a rating of 'good' or higher, precisely the same abso-

lute retention preference over nonveterans which is now afforded by Subgroup A-1, here attacked as invalid. Consequently, a holding that veterans with a retention preference over nonveterans with longer service, would mean that passage of the Veterans Preference Act in 1944 narrowed the long-existing scope of veterans' preferences in case of reduction in force of government personnel. The purpose of that Act's sponsors and of Congress in passing it appears to have been precisely the opposite—to broaden rather than narrow the preference.

The Senate Civil Service Committee was told by the congressional sponsor of the measure that 'this bill takes away no existing veterans' preference, either by statute or Executive order, but it does strengthen, broaden, and implement the veterans' preference policy heretofore in effect,' and that it would 'give legislative sanction to existing veterans' preference, to the rules and regulations in the executive branch of the Government. . . .' A member of the Civil Service Commission in explaining the bill to the Senate Committee called the proviso here involved the 'heart of the section,' and stated that it was 'substantially the same' as the 1912 Act, which, as before pointed out, provided for an absolute veterans' retention preference without regard to length of service. And in explaining the Bill on the floor of the House, the sponsor and active proponents of the measure explained it as strengthening and broadening veterans' preferences then embodied in statutes and executive orders.

Not only did the friends of the Veterans Preference Act explain to the Senate Committee on Civil Service and to the Congress the broad preferences the Act would grant. Hostile witnesses graphically pointed out to the Senate Committee what they deemed would be the unfairness of the Act's effect if passed as written. One such witness representing the Civil Service Reform League said: 'I think you ought to give consideration to . . . retention of veterans in civil service regardless of length of service. I do not think it is fair, a veteran be retained in service who has been in the service 6 months as against a person who has been in the service 25 years. I believe some distinction might be made, otherwise you

would do a grave injustice to those people who have long years of service in civil service.' And another witness against the Bill pointed out that under it nonveterans would 'be the first to be laid off and the last to be taken on.'

Thus Congress passed the bill with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act. Petitioner makes an appealing argument against this policy. But it is a policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy.

Affirmed."

THE RULE THAT ADMINISTRATIVE REMEDIES MUST BE EXHAUSTED DOES NOT APPLY WHERE THERE IS NO SUCH RIGHT OF APPEAL

The rule that administrative remedies must be exhausted before resorting to court action is subject to another exception. The right of appeal must exist under the statutes. The Act of 1912 (5 U. S. C. 648) provides that no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary. The Executive Orders of the President of March 3, 1923, and June 4, 1925, covered the petitioners in their employment. But under neither the statute of 1912 nor the Executive Orders was there any right of appeal. Neither under the 1912 statute nor the Executive Orders was the Civil Service Commission or any agency or department of the government given the right of enforcement. In other words, under the 1912 statute and the Executive Orders there was no method of appeal, and the only manner in which the petitioners' rights could be enforced if such rights were violated was by the court action which was brought. The right of appeal is limited only to the Act of June 27, 1944.

In the case of *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 89 L. Ed. 173, a railroad employee brought a suit to enforce certain rights. The statute gave him no right of enforcement of such rights. This court held that the right of action was not precluded by the possibility of an administrative remedy. This case is squarely in point on the issue of petitioners' rights under the 1912 statute, supra, and the Executive Orders of March 3, 1923, and June 4, 1925. Furthermore, since the 1912 statute and the Executive Orders did not give authority to any agency or department to enforce the rights, the action which the petitioners brought, resting alone on the 1912 statute and the Executive Orders, could be maintained. This court has held that, where a board has only authority to make investigations and recommendations, the plaintiff does not have to exhaust administrative remedies before bringing suit in the courts.

United States Alkali Export Assn., Inc., v. *United States*, 325 U. S. 196, 89 L. Ed. 1554.

THE CASES CITED BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA ARE NOT IN POINT.

In the opinion the Court of Appeals below cites the case of *Securities & Exchange Commission* v. *Otis & Co.*, 338 U. S. 843. In that case this court entered a per curiam opinion reversing judgment upon the decision of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459. The case of *Myers* v. *Bethlehem Shipbuilding Corp.* is not in point. In that case issues of fact were present and the plaintiffs were required to exhaust their administrative remedies and there is no question but this is the general rule. The case of *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 90 L. Ed. 839, 66 S. Ct. 712 is likewise not in point because it involves issues of fact. In these cases there is no issue of fact. The same

situation as issues of fact exists in *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802, 91 L. Ed. 1261, 67 S. Ct. 963. The case of *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 566, 90 L. Ed. 318 which the United States Court of Appeals for the 1st Circuit relied upon in deciding the case of *Wettre* v. *Hague, supra*, is directly in point. In that case this court said:

> "Of course, where the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * * created' to protect the interest of individuals or the public is clearly shown a court of equity could, in a proper case, intervene. Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 74 L. Ed. 1034, 50 S. Ct. 427; Virginian R. Co. v. System Federation, R. E. D. 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592. * * *"

The Veterans' Preference Acts were clearly and wilfully being violated by the respondents in these causes as was found by the identical situation in the case of *Wettre* v. *Hague, supra*, by the 1st Circuit.

CONCLUSION

Wherefore the petitioners pray that a writ of certiorari may issue under the seal of this honorable court in these causes, directed to the United States Court of Appeals for the District of Columbia, and that upon review the judgment of the United States Court of Appeals be vacated, reversed and set aside, and that the judgment of the District Court for the District of Columbia be affirmed and that this cause be remanded to the said United States Court of Appeals with instructions to proceed further in accordance with the views of this court.

CLAUDE L. DAWSON,
917 - 15th St., N. W.,
Washington, D. C.
Attorney for the Petitioners.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	11
Appendix	12

CITATIONS

Cases:

Aircraft & Diesel Corp. v. *Hirsch*, 331 U. S. 752	4, 5
Brooks v. *Dewar*, 313 U. S. 354	11
Farley v. *United States*, 92 F. 2d 533	9
Federal Power Commission v. *Arkansas Power & Light Co.*, 330 U. S. 802	5, 9
Fischer v. *Haeberle*, 80 F. Supp. 652	4
Joy v. *Hague*, 175 F. 2d 395, certiorari denied, 338 U. S. 870	10
Knowles v. *War Damage Corp.*, 171 F. 2d 15, certiorari denied, 336 U. S. 914	10
Macauley v. *Waterman Steamship Corp.*, 327 U. S. 540	5, 9
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	5, 9
Order of Conductors v. *Pitney*, 326 U. S. 561	5
S. E. C. v. *Otis and Co.*, 338 U. S. 843	5
Slocum v. *Delaware, L. & W. R. Co.*, No. 391, this Term	6
Switchmen's Union v. *Board*, 320 U. S. 297	5
Wettre v. *Hague*, 81 F. Supp. 590, 168 F. 2d 825	4, 5, 6, 10
Work v. *Louisiana*, 269 U. S. 250	8

Statutes:

Act of August 23, 1912, 37 Stat. 360, 413, as amended	3
28 U.S.C. 1331	10
Veterans Preference Act of June 27, 1944, 58 Stat. 387, as amended, 61 Stat. 723, 5 U.S.C., Supp. II, 863	3
Section 14	5, 12

Miscellaneous:

5 C.F.R. 22.1 to 22.11 (1949 ed.)	10
5 C.F.R. 22.11 (f) (1949 ed.)	7

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 721

JEPSON L. NELSON AND CHARLES W. REEVES, PETITIONERS

v.

LOUIS JOHNSON, SECRETARY OF NATIONAL DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The orders of the District Court, granting petitioners' cross-motions for summary judgments, are not reported (R. 58-59, 65-66). The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported (R. 69-70).

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1950 (R. 71). The petition for a writ of certiorari was filed on March 30, 1950.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioners, who are civilian employees of the Navy Department and also veterans of World War I, were demoted from supervisory positions to jobs of lower rank and pay. They allege that the demotions violate their statutory veterans' preference rights inasmuch as non-veterans were retained in the supervisory positions.

The only question presented is whether petitioners, prior to seeking judicial relief for the alleged violation of their rights, must exhaust their administrative remedies before the Civil Service Commission.

STATUTE INVOLVED

Section 14 of the Veterans Preference Act of June 27, 1944, 58 Stat. 387, as amended, 61 Stat. 723 (5 U.S.C., Supp. II, 863) is set forth in the Appendix, *infra*, pp. 12-13.

STATEMENT

Petitioners, veterans of World War I, are civilian employees of the Navy Department, employed in the Philadelphia Naval Shipyard. During March, 1948, they were notified that effective May 17, 1948, they would be demoted from their supervisory positions to jobs of lower rank and pay (R. 38, 39, 44, 60, 61-62). The demotions were proposed after a comparison of petitioners' qualifications with those of competing employees and a determination that their demotions would

promote the efficiency of the service (R. 41, 44, 63). Petitioners appealed to the Civil Service Commission in accordance with the prescribed procedure made available to war veterans.[1]

On April 8, 1948, and while these appeals were pending, petitioners brought the instant actions against respondents (the Secretary of the Navy and the Secretary of Defense) for preliminary and permanent injunctions to restrain the proposed demotions (R. 37-43, 59-65). The gist of the complaints was that the proposed demotions violated their rights under the Act of August 23, 1912, 37 Stat. 360, 413, as amended, and the Veterans Preference Act of June 27, 1944, 58 Stat. 387, as amended, because nonveterans were being retained in similar positions (R. 40, 62). After hearing petitioners' requests for preliminary injunctions on May 10, 1948, the District Court, concluding that the proposed demotions would not result in irreparable injury, denied interim injunctive relief (R. 58). Petitioners were demoted on May 17, 1948 (R. 56).

Thereafter, petitioners and respondents moved for summary judgment. The District Court, on October 18, 1948, granted petitioners' motions and

---

[1] The record shows that petitioner Nelson "availed himself of the right of appeal to the United States Civil Service Commission" (R. 56). Since the record also stipulates that all evidence pertaining to Nelson pertains to petitioner Reeves as well (R. 67-68), it must be presumed that Reeves also appealed to the Commission. The court below so ruled (R. 70).

directed respondents to restore petitioners, as of May 17, 1948, to the positions from which they had been demoted on that date (R. 59, 66).

On appeal, the Court of Appeals, in a *per curiam* opinion, reversed on the ground that petitioners had failed to exhaust their administrative remedies before filing suit (R. 70).

ARGUMENT

The holding of the court below does no more than require a civil servant, who seeks reinstatement to a supervisory position from which he has been demoted in alleged violation of his veteran's preference rights, to exhaust administrative remedies available to him before the Civil Service Commission prior to seeking judicial intervention. Strictly speaking, this holding conflicts with one aspect of a decision of the Court of Appeals for the First Circuit in the same field (*Wettre* v. *Hague*, 168 F 2d 825, 826) and it is on this technical conflict that petitioners place sole reliance (Pet. 5).[2] We submit, however, that no necessity exists to resolve the conflict with the *Wettre* decision or to review again the petition's single and narrow question, *i.e.*, whether administrative remedies, prescribed by statute, must be exhausted before court relief may be sought.

---

[2] That the conflict may be illusory is indicated by *Fischer* v. *Haeberle*, 80 F. Supp. 652 (E.D.N.Y.), where the *Wettre* holding is limited to the situation where no steps have been taken to initiate the administrative remedy. But cf. *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 767.

1. The First Circuit's decision, unlike that of the court below, is "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802; *S. E. C.* v. *Otis and Co.*, 338 U. S. 843 (summarily decided, on the basis of the previous cases, at the time of granting of certiorari). The cited cases are not distinguished nor even mentioned in the *Wettre* discussion of the administrative remedy exhaustion issue.[3] Indeed, the First

[3] To justify its departure from the exhaustion rule, the Court of Appeals relied solely on a statement in *Order of Conductors* v. *Pitney*, 326 U. S. 561, 566, to the effect that equity may intervene to ward off the "sacrifice or obliteration of a right which Congress * * * created." 168 F. 2d 825, 826; Pet. 28. However, the quoted language, as is apparent from this Court's opinion in the case in which it was first used, was simply a restatement of the proposition that an equity court may grant relief where but for its general equity jurisdiction "there would be no remedy to enforce the statutory commands which Congress had written." *Switchmen's Union* v. *Board*, 320 U. S. 297, 300. In the instant case, a statutory remedy is expressly created by Section 14 of the Veterans Preference Act of 1944 (Appendix, *infra*, pp. 12-13), and there is no contention here that that administrative remedy is inadequate to effectuate the purpose of the Act. See *infra*, p. 7, fn. 4. Moreover, it is significant to note that the *Pitney* case itself fully applied the exhaustion rule and, as recently pointed out by this Court, actually held that a federal district court was not empowered to adjudicate initially a jurisdictional dispute between two unions "but should have left this question for determination by the

Circuit's ruling on that aspect of the case is so radical a departure from the principles reiterated in the cited cases, that it may be expected that that Court of Appeals will itself correct its holding. Should it fail to do so in any future veteran's demotion case, review can be sought at the instance of the Government.

Obvious considerations of orderly procedure, upon which the rule rests, require that matters within the jurisdiction of an administrative body be determined by it before the courts will act. Otherwise, a situation would be created where various phases of the same case would be pending before the Commission and the courts at one time. The instant case is illustrative. Petitioners, after being notified of the available administrative remedy prescribed by statute, took appeals to the Civil Service Commission. While these appeals were pending, they filed the instant suit in the District Court. Such premature interference with the administrative process can be avoided only by requiring petitioners to exhaust their remedies before the Civil Service Commission. In imposing that requirement, the decision of the court below, in contrast with the *Wettre* decision, makes possible the orderly and effective determination by administrative bodies of matters within their jurisdiction.

[National Railway] Adjustment Board, a congressionally designated agency peculiarly competent in this field." *Slocum* v. *Delaware, L. & W. R. Co.*, No. 391, this Term, slip opinion, p. 5.

In urging the nonapplicability of the exhaustion rule, petitioners do not, and cannot, here contend that the administrative remedy available to them is inadequate.[4] Instead, they argue that a failure to follow that rule is justified here inasmuch as "nothing would be gained by the exercise of the right of appeal [*i.e.*, to the Commission], because finally the petitioners would be entitled to a judgment restoring them to the positions from which they had been reduced" (Pet. 23). But, if the rule could be ignored whenever a complainant felt that a court would ultimately adopt his interpretation of a statutory provision, it is obvious that the rule would be meaningless. In addition, the argument overlooks the very basis of the exhaustion rule—the need for giving the Commission an opportunity for determining for itself whether petitioner's interpretation is the proper one and whether he is entitled to relief on the basis of that interpretation. Even if it be assumed that respondents (the Secretary of Defense and the Secretary of the Navy) acted, as petitioners allege, in "utter defiance" of their veterans' preference rights, no justification

---

[4] Section 14 of the Veterans' Preference Act of 1944 (Appendix, *infra*, pp. 12-13) authorizes the Civil Service Commission to make recommendations to the agency involved and makes it "mandatory for [the] administrative officer [of that agency] to take such corrective action as the Commission finally recommends." 5 U.S.C. 863; 5 C.F.R. 22.11(f) (1949 ed.). Thus, the Commission is empowered to direct the granting of the relief for which petitioners brought suit—to reinstate them to the positions from which they were demoted.

exists for petitioners' failure to exhaust their administrative remedies before the Commission (Pet. 21).[5] The Commission may very well have found

---

[5] *Work* v. *Louisiana*, 269 U. S. 250, relied on by petitioners (Pet. 21, 23), does not justify their failure to exhaust their administrative remedies. In that case, the Commissioner of the General Land Office required a State, applying for a patent to certain "swamp and overflowed" lands under a federal act, to show that those lands were non-mineral in character. The State, alleging that the act authorized the patenting of mineral as well as non-mineral lands and that the requirement of the non-mineral showing was therefore illegal, appealed to the Secretary of the Interior, who affirmed the Commissioner's decision. Later, the Secretary, on a motion by the State for rehearing, adhered to his ruling. The State, in order to avoid the necessity for attempting to make this non-mineral showing, then filed suit, asserting that it had "completely exhausted its rights of appeal and petition before the Department of the Interior, and that its only remaining remedy is by appropriate appeal to the courts." See Transcript of Record, p. 4, in the *Work* case, No. 5, October Term, 1925. The Government's motion to dismiss, despite petitioners' statement to the contrary (Pet. 21), in no way denied the exhaustion of administrative remedies, but was based in part on the ground that the Secretary's decision was nonreviewable by the court. See Transcript, *supra*, at pp. 28-29. This motion was overruled, and the Secretary was ordered to vacate the decisions requiring the non-mineral showing, and enjoined from taking any action except issuing title to the State. The Court of Appeals and this Court affirmed. However, this Court ruled that in so far as the injunction also "requires the Secretary to recognize that the State has already established its right to the lands" it "is plainly erroneous" for the reason that the Secretary "has not as yet determined that they were swamp and overflowed lands * * * and he may not be restrained from investigating and determining this in any appropriate manner." 269 U. S. 250, 261. In other words, to the extent that the State's administrative remedies had been exhausted [*i.e.*, on the requirement for a non-mineral showing], the injunction was upheld; to the extent that it dealt with matters as to which the Secretary had not yet had an opportunity to make any determination [*i.e.*, with respect to the swamp or overflowed character of the land], the injunction was reversed. It is obvious, therefore, that the *Work* case actually supports the rule requiring

petitioners entitled to the jobs from which they were demoted and then ordered the necessary corrective action.[6] And certainly the possibility of the Commission's disagreement with petitioners' views does not, as pointed out by the court below, "create an exception" to the exhaustion rule (R. 70). Whether the Commission is right or wrong in the result it reaches, the decision was clearly one for it to make in the first instance.

Equally untenable is petitioners' assertion that the exhaustion rule is limited to situations where the problem before the administrative agency is factual in nature and that it should not therefore be applied to the instant case which presents "no issue of fact" (Pet. 27). The case of *F. P. C.* v. *Arkansas Power & Light Co.*, 330 U. S. 802, is dispositive of the alleged limitation on the rule. There the Court of Appeals had refused to permit the Commission first to pass on certain questions on the ground that they were purely legal (156 F. 2d 821, 828), and this Court reversed *per curiam*. See, also *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, 544; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, and cases cited.[7]

---

exhaustion of administrative remedies and furnishes petitioners in the instant case with no support.

The only other case discussed by petitioners on this point, *Farley* v. *United States*, 92 F. 2d 533 (C.A.D.C.), simply reiterates the rule that a public official may be mandamused to perform a plainly-prescribed, statutory duty—a proposition not in any way involved in the instant case.

[6] See footnote 4, *supra*, p. 7.

[7] Petitioners also argue that the exhaustion rule should not be applied to them because they have no right of administra-

2. The fact that the result in the *Wettre* case was later supported, and that the result in the instant case is similarly supportable, on a ground completely independent of the administrative remedy question, constitutes an additional reason for not resolving the conflict between the First Circuit's decision and the decision below. In the *Wettre* case, the District Judge, after remand of the case by the Court of Appeals, and relying on 28 U.S.C. 1331, dismissed the complaints for lack of jurisdiction because the demoted veterans in that case had made no showing that as to each of them the amount in controversy equals or exceeds $3,000. 81 F. Supp. 590 (D. Mass.). The Court of Appeals for the First Circuit affirmed this dismissal for lack of jurisdiction, stating that the District Court "decision was correct,—indeed, unavoidable and mandatory upon the part of the court. *Insular Police Commission* v. *Lopez,* 1 Cir., 160 F. 2d 673." *Joy* v. *Hague,* 175 F. 2d 395. Certiorari was denied by this Court on November 7, 1949. 338 U. S. 870. The same monetary limitation is applicable to the District Court for the District of Columbia. *Knowles* v. *War Damage Corp.,* 171 F. 2d 15 (C.A. D.C.), certiorari denied, 336 U. S. 914,

---

tive appeal (Pet. 26). That this argument is specious is manifested by the fact that petitioners availed themselves of their statutory right to appeal to the Civil Service Commission (R. 56, 70). See, also, the detailed regulations of the Commission governing the procedure on such appeals. 5 C.F.R. 22.1 to 22.11 (1949 ed.).

Application of these considerations to the instant case, where the complaints, like that in the *Wettre* case, contain no showing as to the necessary jurisdictional amounts, makes it clear that the decision of the court below is also supportable on a ground independent of the exhaustion rule. In parallel circumstances, this Court has refused to resolve an "asserted conflict" where, as here, the complaint cannot lead to ultimate recovery. *Brooks* v. *Dewar*, 313 U. S. 354, 360.

CONCLUSION

The decision of the court below is clearly correct and, while in conflict with the first *Wettre* decision, there is no need here to resolve the conflict. The petition should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
SAMUEL D. SLADE,
MORTON HOLLANDER,
Attorneys.

MAY 1950.

APPENDIX

Section 14 of the Veterans Preference Act of June 27, 1944, 58 Stat. 387, as amended, 61 Stat. 723 (5 U. S. C., Supp. II, 863), provides:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That

such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further,* That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 of this title.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 884138 687

INDEX

PAGE

Jurisdiction 2

Reasons for Petition for Rehearing 2

Conclusion 15

TABLE OF CASES CITED

Bertram v. Johnson, et al, C. A. #143-50, Dist. Ct. DC 3

Breiner, et al v. Wallin, et al, C. A. #7694, Ct. of App. Third Circ. 3

Callahan v. Wallin, et al, C. A. #8613, E. D. of Penna. 3

Dawson v. Sullivan, et al, C. A. #2119-49, Dist. Ct. DC 3

Fischer, et al v. Matthews, et al, C. A. #9296, Dist. Ct. DC 3

Hilton v. Sullivan, et al, 334 U. S. 323, 92 L. Ed. 1416 3

Hopkins, et al v. Wallin, et al, C. A. #8848, E. D. of Penna. 3

Hunter, et al v. Matthews, et al, C. A. #9994, Dist. Ct. DC 3

Levy et al v. Watt et al, C. A. #50-260 Dist. Ct. for Dist. of Mass. 9

Reynolds, et al v. Matthews, C. A. #424-49, Dist. Ct. DC 3

Salter v. Matthews, et al, C. A. #2382-49, Dist. Ct. DC 3

Schweizer v. Kniskern, et al, C. A. #8913, E. D. of Penna. 3

Sullivan v. Johnson, C. A. #1012-49, Dist. Ct. DC 3

Wettre et al v. Hague et al, 168 F. 2d 825 4

AUTHORITIES CITED

Act of August 23, 1912, 37 Stat. 413, 5 USC 648 3

Act of June 27, 1944, 58 Stat. 387, 5 USC 851 ..... 3, 4

Supreme Court of the United States

October Term, 1949

No. 721

JEPSON L. NELSON, *Petitioner*,

v.

LOUIS JOHNSON, SECRETARY OF NATIONAL DEFENSE, ET AL., *Respondents*,

---

No. 721

CHARLES W. REEVES, *Petitioner*,

v.

LOUIS JOHNSON, SECRETARY OF NATIONAL DEFENSE, ET AL., *Respondents*.

Petition for a Rehearing on a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioners and present their petition for a rehearing of the petition for certiorari in the above entitled cases.

1.

JURISDICTION

The petition for certiorari was filed on March 30, 1950 and was denied on May 15, 1950. This petition is filed within 15 days thereafter as required under the rules of this court.

2.

REASONS FOR PETITION FOR REHEARING

In applying for this rehearing, your petitioners reiterate each and every ground, matter and thing set forth in the original petition for certiorari.

Counsel for the petitioners cannot understand the reason for the denial of the writ of certiorari. The application is made under Rule 38(b) in which the following example of grounds for the issuance of the writ is stated to be:

> (b) "Where a Circuit Court of Appeals has rendered a decision in conflict with another Circuit Court of Appeals on the same matter."

These cases fall squarely within the rule above quoted. Counsel understands that the issuance of the writ is a matter of judicial discretion, but where it appears that positive grounds for the issuance of the writ exist under the rules of this Court, it would seem that the petition for certiorari should be granted.

These cases are of the utmost importance. There has been a wide-spread violation of Veterans Preference Laws by government officials particularly in the Shipyards under the jurisdiction of the Navy Department. Numerous suits have been brought against Naval Yard officials to compel obeyance to the preference accorded to Veteran Preference eligibles in governmental employment. Among these cases are the following:

Bertram v. *Johnson, et al,* C. A. #143-50, Dist. Ct. DC
Breiner, et al v. *Wallin, et al,* C. A. #7694, Ct. of App. (3rd) Circ.
Callahan v. *Wallin, et al,* C. A. #8613, E. D. of Penna.
Dawson v. *Sullivan, et al,* C. A. #2119-49, Dist. Ct. DC
Fischer, et al v. *Matthews, et al,* C. A. #9296, Dist. Ct. DC
Hopkins, et al v. *Wallin, et al,* C. A. #8848, E. D. of Penna.
Hunter, et al v. *Matthews, et al,* C. A. #9994, Dist. Ct. DC
Reynolds, et al v. *Matthews,* C. A. #424-49, Dist. Ct. DC
Salter v. *Matthews, et al,* C. A. 2382-49, Dist. Ct. DC
Schweizer v. *Kniskern, et al,* C. A. #8913, E. D. of Penna.
Sullivan v. *Johnson,* C. A. #1012-49, Dist. Ct. DC

All of the above named cases involved an issue of law identical as in the *Nelson* and *Reeves* cases. The principal question of law arises from the determination of whether the 1912 statute, which reads as follows:

> "In the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary." (5 U. S. C. 648)

As the same was extended by Executive Order of the President of the United States, was in force and effect after passage of the Act of June 27, 1944, known as the Veterans Preference Act.

This Court in the case of *Hilton* v. *Sullivan, et al,* 334 U. S. 323, 92 L. Ed. 1416, referring to the 1912 statute at page 1425, said:

> "And subsequent executive orders not only recognized this provision as giving veterans an absolute preference but also extended the preference to veterans in the field service and to positions not under civil service."

The employees of the Philadelphia Naval Shipyard where the petitioners are employed are in the so-called field service. They fall directly within the Executive Order which extended the statute to the field service.

This Court held in *Hilton* v. *Sullivan, supra,* that the statute in question was "an absolute command that no honorably discharged soldier or sailor whose record was good could be DISCHARGED, or REDUCED IN RANK, GRADE AND SALARY."

Yet this is exactly what happened to petitioners Nelson and Reeves. They were reduced in rank and grade and non-veterans were retained in their grades. This was a plain, deliberate and wilful violation of the statute and Executive Order construed by this Court in *Hilton* v. *Sullivan, supra.* There is no issue of fact in these cases, the facts are admitted, there is only a question of law involved. May public officials wilfully violate the law and is there no immediate relief for the petitioners?

The United States Court of Appeals for the First Circuit held, in the case of *Wettre et al* v. *Hague et al,* 168 F. 2d 825, that the 1912 statute and Executive Order which extended the same were not repealed by the Act of June 27, 1944 known as the Veterans Preference Act.

The United States Civil Service Commission holds that the 1912 statute and Executive Order extending the same WERE REPEALED by the Act of June 27, 1944. Here is the authority to this effect. In a letter to counsel for the petitioners under date of February 14, 1950, the United States Civil Service Commission ruled as follows:

> "The next point you make has to do with the Act of 1912 regarding reductions in force. It is your position that the Act of 1912 is still current law and that the rights of veterans should be determined in the light of the law. In this connection you have referred to the case of Hilton v. Sullivan. As you know, the Commission, with the strong support of the De-

partment of Justice, has taken the position that the applicable provision of the Act of 1912 has been superseded by Section 12 of the Veterans Preference Act. This question is involved in several suits now pending in various courts. May I refer you to the opinion of Judge Galston in the United States District Court, Eastern District of New York, Civil Action No. 9296, William A. Fischer, et al v. F. E. Haeberle, et al. In that case the court agreed with the views of the Commission that the applicable provision in the Act of 1912 was superseded by the Veterans Preference Act."

/s/ Harry B. Mitchell,
Chairman"

In the case of *Wettre et al* v. *Hague et al, supra,* the First Circuit held that the plaintiffs rights were so fixed and determined by the 1912 statute that it was not even necessary to exhaust any administrative remedies. In so doing they stated as follows:

"When this case was tried below, and even when it was argued before us on appeal, it was an open question whether the Veterans' Preference Act of 1944 narrowed, or whether it left unaffected, the long-existing broad scope of the preferences given to veterans by the proviso of Sec. 4 of the Act of 1912, supra, which reads:

"Provided, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary."

Now, however, this question has been put at rest. The very recent decision of the Supreme Court of the United States in Hilton v. Sullivan, 68 S. Ct. 1020, 1026, authoritatively establishes that Congress in the Veterans' Preference Act of 1944 did not intend to restrict, limit or narrow the scope of the benefits conferred upon veterans by earlier legislation, but instead intended to enlarge the preference in government employment they already enjoyed. And in the Hilton case the Supreme Court said that there was

nothing ambiguous about the language of the 1912 proviso quoted above, and that "It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good'. Length of service in no way qualified the preference given the veteran."

We are not concerned here with the full scope of the preference given to veterans by the statute as thus interpreted—whether it means that veterans with a rating of 'good' have to be retained on the government's payroll even though there may be no work remaining for them to do (see Longfellow v. Gudger, 57 App. D. C. 50, 16 F. 2d 653, 656), or whether veterans with that rating cannot be reduced from supervisory rank even though there may be no employees left for them to supervise. These are questions for consideration when they arise. The complaint as we read it alleges only that the plaintiffs, being veterans with a rating of 'good', are about to be demoted from given supervisory positions while non-veterans, presumably with greater seniority, are being retained in those positions. Since this clearly alleges a violation of the planitiffs' legal rights under the applicable statute as it is now construed, there is no longer any occasion for the requirement that they exhaust whatever administrative remedies they may have before seeking to vindicate their rights in court, for, as the Supreme Court said in Order of Railway Conductors of America v. Pitney, 326 U. S. 561, 566, 66 S. Ct. 322, 324, 90 L. Ed. 318, "Of course, where the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * * created' to protect the interest of individuals or the public is clearly shown, a court of equity could, in a proper case, intervene. Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034; Virginian R. Co. v. System Federation, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789."

Thus in view of the decision in the Hilton case, the judgment appealed from must be set aside and the case remanded for rulings on the other grounds ad-

vanced by the defendants in support of their motion to dismiss, if they care to press them in view of the decision in Williams v. Fanning, 332 U. S. 490, 68 S. Ct. 188, decided after the case at bar was decided by the court below, and, if that court finds it appropriate, for determination on the merits.

The judgment of the District Court is vacated and the case is remanded to that court for further proceedings consistent with this opinion."

The United States Court of Appeals for the District of Columbia does not agree with this opinion of the First Circuit.

Thus we have the First Circuit holding that the 1912 statute and Executive Order were not repealed based upon the decision of this Court in *Hilton* v. *Sullivan, supra,* and the United States Civil Service Commission ruling that the 1912 statute and Executive Order were repealed.

There are no facts to be determined by the United States Civil Service Commission. The petitioners were admittedly reduced in rank and grade due to a reduction in the force in the Philadelphia Naval Shipyard. These facts were pleaded in the complaint and the motion for summary judgment admits them. There is only an issue of the law to be determined and that is whether the First Circuit is right in ruling that the 1912 statute and Executive Order were not repealed, and therefore the administrative remedies did not have to be exhausted, and the United States Court of Appeals for the District of Columbia ruling that the administrative remedies would have to be exhausted.

The conflict of opinions is due to the difference of opinions whether the 1912 statute and Executive Orders extending the same to the field service was superseded by the 1944 Veterans Preference Statute. If it was not as held by the First Circuit, then as this Court said, that statute was an "absolute command" that no honorably discharged soldier or sailor whose record was good could

be discharged or reduced in rank, grade and salary, no exhaustion of administrative remedies is necessary. These cases, therefore, involve the question of whether the 1912 statute was superseded by the Act of 1944.

What would be accomplished by an appeal to the United States Civil Service Commission? The only issue is one of law, and they have already ruled against the petitioners. This Court, in the interest of right and justice, should not require the petitioners to go back to the United States Civil Service Commission for the sole purpose of having them re-affirm that the 1912 statute and Executive Orders issued thereunder were repealed by the Act of June 27, 1944. That question should be now decided, and this Court should take jurisdiction to decide it, and settle the dispute as to the law between the First Circuit, the Court of Appeals for the District of Columbia and the United States Civil Service Commission. Petitioners believe that this Honorable Court should grant the petition to carry out the Court's rules applicable to petitions for certiorari where there is obviously a conflict of opinions, and it would seem that perfect grounds exist for the allowance of the petition for certiorari. It would seem that a plain duty is forced upon this Court, to take jurisdiction and to carry out the purposes for which this Court was created, to settle disputed questions of law.

But there exists other reasons for the issuance of the writ of certiorari. Since the decision of the United States Court of Appeals for the District of Columbia, the District Court here has refused to issue preliminary injunctions restraining the Secretary of National Defense, and the Secretary of the Navy from reducing a veteran preference eligible in rank, grade and salary. The injunction was refused in the case of *Bertram* v. *Johnson et al*, Civil Action #143-50, Dist. Ct. DC, based upon the ruling of the Court of Appeals for the District of Columbia in these cases.

At the same time, the United States District Court for the District of Massachusetts has issued a preliminary injunction in the case of *Levy et al* v. *Watt et al* restraining the defendants, officials of the Boston Naval Shipyard, from reducing certain of the plaintiffs in rank, grade and salary. In that case the plaintiffs did not exhaust their administrative remedies. The District Court followed the opinion of the First Circuit in the case of *Wettre et al* v. *Hague et al, supra,* which it had every right to do. Judge McCarthy rendered the following opinion:

Levy et al v. *Watt et al*
Opinion by
Judge McCarthy

This is a "suit for preliminary and permanent injunction, injunctive relief, for a restraining order, for declaratory judgment and judicial review of agency action". The suit is brought by fifteen employees of the Boston Naval Shipyard, all of whom are veterans of wartime service in the armed forces of the United States, against the Commander of that Shipyard and several members of his staff, to secure injunctions restraining proposed demotions of plaintiffs. The case is before me on plaintiffs' motion for a preliminary injunction.

The plaintiffs in this action have been informed by written notice that it is proposed to demote them from the supervisory positions which they presently hold in the Boston Naval Shipyard. These proposed demotions will become effective on or about May 1, 1950.

All of the plaintiffs are permanent civil service employees with competitive status. All of the plaintiffs except Curtis and O'Brien have efficiency ratings of "excellent" and Curtis and O'Brien have efficiency ratings of "very good".

The defendants are employees of the United States Government in the Boston Naval Shipyard; the defendant Watt is the Commander of said Shipyard; the defendant Stillwell is the Industrial Relations

Officer; the other named defendants are Masters in said Shipyard.

The palintiffs Swenson, Brisbois, Anderson, Hall, Quatromoni, Fraser, Hubble and Pike are conditional appointees to their respective supervisory positions. It has been stipulated that each of these plaintiffs was appointed to his present position upon the condition that he take and pass a civil service examination therefor and that he secure a rating which would place him within reach on the register to be drawn as a result of the examination. All of these plaintiffs named in this paragraph have failed to secure such a position on the register for their respective positions and trades, under the applicable provisions of Naval Civilian Personnel Instructions 160. All of the other plaintiffs are in a "non-conditional" status in their respective supervisory positions.

If the plaintiffs Curtis, O'Brien and Fraser are demoted from their present supervisory positions no non-veterans will remain in the positions from which they will be demoted. In the case of the plantiff Fadden, who has the position of Chief Quarterman Electric Welder, a non-veteran occupying the position of Foreman Welder, will be retained. In the case of the plaintiffs other than Curtis, O'Brien, Fraser and Fadden, non-veterans will be retained in supervisory positions within the competitive area from which plaintiffs will be demoted.

The proposed demotions are part of or the proximate result of a reduction in force which has been taking place in the Boston Naval Shipyard.

If the plaintiffs Gunning (Quarterman Plumber), Levy, Kelleher, and Cotter (Leadingman Plumbers) are demoted as proposed, certain non-veterans whose names appear below those of these plaintiffs on the Quarterman Plumber and Leadingman Plumber lists, which are maintained in the Boston Naval Shipyard, will be retained in the positions which these plaintiffs now occupy.

It is not controverted that if each plaintiff is reduced in rank and salary from his present supervisory position to the next inferior rank the loss of income in each case, without regard to other benefits,

as a direct result of the reduction will be in excess of $500 per year. The average loss of salary will amount to approximately $700.00 per year. Each plaintiff has in excess of eight years before reaching the retirement age of seventy.

This action is based upon the Act of August 23, 1912 (5 USCA 648) and the Act of 1944 (5 USCA 861), known as the Veterans' Preference Act, Executive Orders of the Presidents extending to and granting preference to honorably discharged soldiers, sailors, or marines in the civilian employment of the United States who have an efficiency rating of "good" or better. I find that the requisite amount in controversy to give this court jurisdiction of the action ($3,000, exclusive of interest and costs) is present. I, therefore, conclude that this court has jurisdiction of the instant case.

As to the plaintiffs Gunning, Levy, Kelleher and Cotter, I feel that a preliminary injunction should issue against the defendants. Section 4 of the Act of 1912, as amended, provides that in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated "good" shall be discharged or dropped or reduced in rank or salary. The Veterans' Preference Act of 1944 does not restrict the scope of the benefits conferred upon veterans by the Act of 1912, as amended. *Hilton v. Sullivan,* 334 U. S. 323; *Wettre v. Hague,* 1 Cir., 168 F. 2d 825. The demotion of the plaintiffs Gunning, Levy, Kelleher and Cotter from their supervisory positions during a reduction in force clearly appears to violate the provisions of Section 4 of the Act of 1912, as amended, as long as non-veterans with equal or lower efficiency ratings are retained with no decrease in pay in the positions from which these plaintiffs are to be demoted. To maintain the status quo until the merits of the claims of Gunning, Levy, Kelleher and Cotter have been determined, an order will issue enjoining such demotion.

I am not disposed to enjoin the defendants from demoting the plaintiffs, Swenson, Brisbois, Anderson, Hall, Quatromoni, Fraser, Hubble and Pike. These

plaintiffs are conditional appointees whose right to preference in their supervisory capacities was dependent upon their passing a competitive promotion examination and attaining a rating which would place them within reach on the respective registers. It is clear that this condition has not been fulfilled. Consequently, this is not a case where the alleged violation of the plaintiffs' respective rights is so clear as to warrant the issuance of a preliminary injunction.

In the case of the plaintiffs Fraser, Curtis and O'Brien non-veterans will not be retained in the same positions if these plaintiffs are demoted. The court declines to issue a preliminary injunction as to them.

If the plaintiff Fadden is demoted, no non-veteran will be retained in the same position which this plaintiff now occupies.

It is, therefore, ORDERED that defendants, and each of them, their agents, servants, employees and attorneys, collectively and individually, are enjoined during the pendency of this action from demoting the plaintiffs Edward J. Gunning, Leo C. Levy, Michael J. T. Kelleher and William F. Cotter from their present respective permanent civil service positions in the Boston Naval Shipyard so long as there are competing nonpreference employees with equal or lower efficiency ratings holding positions within the competitive area which plaintiffs are qualified and willing to fill.

The issuance of the preliminary injunction is conditioned upon the giving of security in the sum of $1500 by each of the plaintiffs Edward J. Gunning, Leo C. Levy, Michael J. T. Kelleher, and William F. Cotter, in accordance with Rule 65 (c), Federal Rules of Civil Procedure.

The motion for preliminary injunction in respect to all of the plaintiffs other than Gunning, Levy, Kelleher, and Cotter is denied.

It will thus be seen that two rules apply, one in the District of Columbia where the veteran preference eligibles cannot get relief although their rights are being wilfully violated, and one in the United States District Court for the District of Massachusetts where the District Court grants the injunction. In both instances, the facts are

identical, it is only the law of the case which is different. In this jurisdiction the Court of Appeals compels the petitioners to go to the United States Civil Service Commission when they already now know what the answer will be, and in the First Circuit they are not required to do this futile thing.

It is true that upon a remand of the *Wettre et al v. Hague et al, supra,* case to the District Court that case was dismissed on another ground, the fact that the complaint did not allege damages to the extent of $3,000 as to each plaintiff. But this in no way changes the opinion originally rendered in the case which Judge McCarthy followed in granting the preliminary injunction in the case of *Levy et al v. Watt et al.*

In the brief in opposition to the brief of the petitioners it is stated that:

> "Indeed, the First Circuit's ruling on that aspect of the case is so radical a departure from the principles reiterated in the cited cases, that it may be expected that that Court of Appeals will itself correct its holding."

The decision of the First Circuit in *Wettre et al v. Hague et al, supra,* is based upon a sound principle of law that no one is required to do a futile thing. In the opinion of counsel for the petitioners who argued the *Wettre* case before the First Circuit, there is no hope of reversal of that decision unless the Court is so compelled by a decision of this Court. It is the only proper and just decision that could be made in a case where the facts are undisputed under the decision of this Court in *Hilton v. Sullivan, supra.*

The United States Court of Appeals for the District of Columbia totally ignored the language of the opinion of Mr. Justice Black in *Hilton v. Sullivan, supra,* and particularly that language which stated that the 1912 statute was an absolute command that no honorably discharged soldier or sailor whose record was good could be dis-

charged, or reduced in rank, grade and salary. If this be the construction of the statute, how could the United States Civil Service Commission change the meaning of the statute and the Executive Orders issued pursuant thereto.

The Court below in its opinion said:

> "We think the District Court erred in granting summary judgment to appellees. In Wettre v. Hague, 168 F. 2d 825, the Court of Appeals for the First Circuit based a different conclusion on Order of Railway Conductors v. Pitney, 326 U. S. 561, 566, and Hilton v. Sullivan, 334 U. S. 323."

This shows conclusively a difference of opinion on the questions of law between the two Circuits. If the rules of this Court mean anything they should mean that the petition for certiorari should be granted or else it will serve notice upon counsel for parties before this Court that this Court ignores its own rules and they cannot safely advise clients in the matter of applying for writs of certiorari.

Counsel knows that this Court is burdened with perhaps a number of applications for writs of certiorari which probably have little or no merit. These cases have merit, they are of interest not only to the approximately 100 men who have filed suits to protect their rights under the Veterans Preference Act, but to thousands of veterans in governmental employment. If public officials charged by law and under their oath of office can wilfully and deliberately violate the law as the Respondents in this case have done in reducing the petitioners in rank, grade and salary, in the very teeth of a statute and Executive Orders to the contrary, then Congress should be called upon to enact penal statutes to correct such situations.

The original petition for certiorari did not go into detail and length because, it was believed by the counsel for petitioners, that under this Court's rules the writ would be granted to settle the conflict between the two

Circuits. It was planned later to file an extensive brief in the matter.

CONCLUSION

WHEREFORE, petitioners respectfully urge that a rehearing be granted. That upon further consideration the order of May 15, 1950, denying the petition for certiorari, be revoked and the writ of certiorari issued.

CLAUDE L. DAWSON,
917 - 15th St., N. W.,
Washington, D. C.
Attorney for the Petitioners.

I, Claude L. Dawson, attorney for the petitioners, Jepson L. Nelson and Charles W. Reeves, do hereby certify that the foregoing petition for rehearing of these causes is presented in good faith and not for delay.

CLAUDE L. DAWSON,
Attorney for the Petitioners.